

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1157

To be argued by
BARRY BASSIS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JAMES R. LORD, JR.,
GERALD J. YAGY, and
GERHARDT J. SCHWARTZ,

Defendants-Appellants.
-----x

BBS
Docket No. 77-1157

BRIEF FOR APPELLANT
GERHARDT J. SCHWARTZ

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
GERHARDT J. SCHWARTZ
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

BARRY BASSIS,
Of Counsel.

CONTENTS

	<u>Page</u>
Table of Cases	ii
Questions Presented	1
Statement Pursuant to Rule 28(a)(3)	
Preliminary Statement	2
Statement of Facts	2
A. The Hearing on the Motion to Suppress Schwartz's Confession	3
B. The Trial	
1. The Government's Case	6
2. The Stabbing of Hook	8
3. The Defense	11
4. Verdict and Sentence	12
 ARGUMENT	
I THE REFERENCES THROUGHOUT THE TRIAL TO THE STABBING OF THE UNINDICTED CO-CONSPIRATOR AND THE PREJUDICIAL PUBLICITY ABOUT THE CASE DEPRIVED APPELLANT SCHWARTZ OF A FAIR TRIAL	13
II THE COURT ERRED IN FAILING TO SUPPRESS APPEL- LANT SCHWARTZ'S POST-INDICTMENT CONFESSION, WHICH WAS TAKEN IN VIOLATION OF HIS RIGHT TO COUNSEL AND TO A PROMPT ARRAIGNMENT	19
III IN VIEW OF THE DESTRUCTION OF AGENT MARTI- NEAU'S ROUGH NOTES OF THE INTERVIEW WITH APPELLANT SCHWARTZ, THE COURT ERRED IN RE- FUSING TO STRIKE THE TESTIMONY REGARDING THE CONFESSION	22
IV INSOFAR AS THEY ARE NOT INCONSISTENT WITH ARGUMENTS RAISED ON BEHALF OF APPELLANT SCHWARTZ, HE ADOPTS THE ARGUMENTS RAISED ON BEHALF OF HIS CO-APPELLANTS LORD AND YAGY	26
Conclusion	26

TABLE OF CASES

<u>Brewer v. Williams</u> , ___ U.S. ___, 45 U.S.L.W. 4287	
(March 23, 1977)	20, 21
<u>Faretta v. California</u> , 422 U.S. 806 (1974)	21
<u>Grunewald v. United States</u> , 353 U.S. 391 (1957)	15
<u>Kirby v. Illinois</u> , 406 U.S. 682 (1972)	20
<u>Margoles v. United States</u> , 407 F.2d 727 (7th Cir.),	
cert. denied, 396 U.S. 833 (1969)	17
<u>Massiah v. United States</u> , 377 U.S. 201 (1964)	20
<u>Sheppard v. Maxwell</u> , 384 U.S. 333 (1966)	17
<u>Silverthorne v. United States</u> , 400 F.2d 627 (9th Cir.	
1968)	17
<u>United States ex rel. Greene v. New Jersey</u> , 519 F.2d 1356	
(3d Cir. 1975)	17
<u>United States ex rel. Lopez v. Zelker</u> , 344 F.Supp. 1050	
(S.D.N.Y.), affirmed, 465 F.2d 1045 (2d Cir.),	
cert. denied, 409 U.S. 1049 (1972)	21, 22
<u>United States v. Agueci</u> , 310 F.2d 817 (2d Cir. 1962),	
cert. denied, 372 U.S. 959 (1963)	17
<u>United States v. Anzalone</u> , Doc. No. 76-1458, slip op.	
3391 (2d Cir., May 6, 1977)	24
<u>United States v. Baker</u> , 442 F.2d 1024 (2d Cir. 1971)	17
<u>United States v. Bentvena</u> , 319 F.2d 916 (2d Cir.), cert.	
denied, 375 U.S. 940 (1963)	17
<u>United States v. Collins</u> , 462 F.2d 792 (2d Cir. 1972)	22

<u>United States v. Curry</u> , 358 F.2d 904 (2d Cir. 1966)	22
<u>United States v. Duvall</u> , 537 F.2d 15 (2d Cir. 1976) ..	21, 23
<u>United States v. Floyd</u> , Doc. No. 76-1462, slip op. 3495 (2d Cir., May 16, 1977)	15, 16
<u>United States v. Garcia</u> , 377 F.2d 321 (2d Cir. 1967)	20
<u>United States v. Harris</u> , 543 F.2d 1247 (9th Cir. 1976) ...	25
<u>United States v. Harrison</u> , 524 F.2d 435 (D.C. Cir. 1975) .	24
<u>United States v. Mase</u> , Doc. No. 77-1009, slip op. 4037 (2d Cir., June 6, 1977)	24
<u>United States v. Massimo</u> , 432 F.2d 324 (2d Cir. 1970), cert. denied, 400 U.S. 1022 (1971)	20
<u>United States v. Mejias</u> , 552 F.2d 435 (2d Cir. 1977)	17
<u>United States v. Panebianco</u> , 543 F.2d 447 (2d Cir. 1976) .	14
<u>United States v. Pfingst</u> , 477 F.2d 177 (2d Cir. 1973)	17
<u>United States v. Pomponio</u> , 517 F.2d 460 (4th Cir. 1975) ..	17
<u>United States v. Satterfield</u> , Doc. No. 76-1372, slip op. 805 (2d Cir., December 7, 1976)	20, 21
<u>United States v. Terrell</u> , 474 F.2d 872 (2d Cir. 1973)	24

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JAMES R. LORD, JR.,
GERALD J. YAGY, and
GERHARDT J. SCHWARTZ,

Defendants-Appellants.

Docket No. 77-1157

BRIEF FOR APPELLANT
GERHARDT J. SCHWARTZ

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the references throughout the trial to the stabbing of the unindicted co-conspirator and the prejudicial publicity about the case deprived appellant Schwartz of a fair trial.
2. Whether the court erred in failing to suppress appellant Schwartz's post-indictment confession, which was taken in violation of his right to counsel and to a prompt arraignment.
3. Whether, in view of the destruction of Agent Martineau's rough notes of the interview with appellant Schwartz, the court erred in refusing to strike the testimony regarding the confession.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Western District of New York (The Honorable John T. Elfvin) rendered on March 18, 1977, convicting appellant Schwartz of bank robbery by force (18 U.S.C. §2113 (a)), armed bank robbery (18 U.S.C. §2113(d)), and conspiracy to commit bank robbery by force (18 U.S.C. §371). Appellant Schwartz was sentenced to 25 years' imprisonment on the bank robbery counts, to run consecutively to a five-year sentence for conspiracy.

By order of this Court, The Legal Aid Society, Federal Defender Services Unit, was assigned as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

On April 9, 1976, the Columbia Banking Savings and Loan Association in Rochester was robbed by two armed men. The defendants -- James Lord, Jr., Gerhardt Schwartz, and Gerald Yagy -- were indicted* on July 29, 1976, for the crimes of bank robbery by force (18 U.S.C. §2113(a)) and armed bank robbery (18 U.S.C. §2113(d)), as well as of conspiracy to commit

*The indictment is reproduced as "B" to the separate joint appendix to appellants' briefs.

bank robbery by force (18 U.S.C. §371). The Government's key witness was an unindicted co-conspirator, Ronald Hook, Jr., who, some time after the bank robbery, allegedly participated in a supermarket robbery with several of the defendants and was later stabbed by appellants Lord and Schwartz. Introduction by the Government of proof of the stabbing, which was unrelated to the bank robbery, and the admissibility of the confession by Schwartz are the main issues on this appeal.

A. The Hearing on the Motion to Suppress Schwartz's Confession

Richard Berry and William Hutton were among the 12 FBI agents involved in appellant Schwartz's arrest at Wyatt Street in the Bronx on November 22, 1976 (23, 26, 34*). At 8:35 a.m. the agents knocked on the door, yelled "FBI," and, one second later, forced the door open (63). Five agents, two of them brandishing shotguns and the others carrying pistols, rushed in and surrounded Schwartz, another man, and two screaming women (63, 65-66). Agent Martineau (who did not testify due to illness (24)) told Schwartz that he was under arrest and informed him of his rights and the charges against him, although he did not show him a copy of the arrest warrant (33-

*Numerals in parentheses refer to pages of the transcript of the pretrial hearings, trial, and sentence. Pages of the transcript of the pretrial conference dated January 25, 1977, are preceded by "A"; pages of the transcript of jury selection on February 8, 1977, are preceded by "B".

34, 61-62, 65). There was no testimony that the agents had informed Schwartz that he had been indicted.

At 9:10 a.m., the agents left the apartment with Schwartz. Rather than taking him to the United States Courthouse at Foley Square or to the FBI office in Manhattan, the agents proceeded to take Schwartz to the FBI office in New Rochelle, where they arrived at 9:30 (24, 26, 66, 86, 102-103).

Agents Berry and Hutton conducted a strip search of Schwartz at 9:55 a.m., after which they gave him an advice of rights form to sign. Before signing, Schwartz asked whether he would be returned to Rochester to face the charges; Martineau answered that he did not know (48, 82-83). The agents permitted Schwartz to make a telephone call to his wife, after which Berry interrogated him. Hutton and Martineau were present during the taking of Schwartz's confession (24). Martineau took notes of the exchange between Berry and Schwartz, which began at 11:40 a.m. (39, 76-77). From his notes, Martineau dictated a narrative version of the confession, which covered the bank robbery, the subsequent robbery of Wegman's supermarket, and the stabbing of Hook. Schwartz signed the typed version at 1:45 p.m. and made a correction, after which he made further oral statements* (40-41, 51, 58, 71, 74). Schwartz then again asked about the possibility of being sentenced in New York, and Berry explained Rule 20 to him (37-38, 87). Neither Berry nor Hutton knew

*Schwartz was not shown the handwritten notes or the typed version of the statements taken after he had signed the confession (77).

where Martineau's handwritten notes were. The two agents contradicted each other as to whether it was an office practice to destroy the notes of a suspect's statements (48, 69, 97).

Because of the destruction of Martineau's notes and the failure of that agent to testify, the defense attorneys moved to strike the testimony of Hutton and Berry (69, 111-112). The court denied this motion (70, 112-113).

At 2:00 p.m., the agents drove Schwartz to their Manhattan office to photograph him* (42-43). They reached the United States Courthouse at 3:07 p.m., and Schwartz was then interviewed by an Assistant U.S. Attorney. He was not arraigned until 4:37 p.m. (31, 101).

Appellant Schwartz testified that Agent Berry had told him that under Rule 20 he could remain in New York City only if he gave a statement. Schwartz thereafter confessed along the lines suggested by the agent, in consideration for being tried in the Southern District (119). Schwartz, who had three prior arrests, denied the truth of the confession (120).

The defense attorneys moved to suppress Schwartz's statements on the ground that they had been taken in "denial of right to counsel" (110) and in violation of his right to a "prompt" arraignment under Rule 9(c)(1), Fed.R.Crim.P. (136-137). The court thought that "there should have been a more prompt taking of Mr. Schwartz before some judicial officer for arraignment..."

*The camera at the FBI's New Rochelle office was not working.

(137) and that the delay was "to some degree reprehensible" (145), but nevertheless denied the motion to suppress.*

B. The Trial

1. The Government's Case

Ronald Hook, an unindicted co-conspirator, was the Government's key witness. At 17, Hook began to work at the pizzeria operated by co-defendant Yagy. In the early months of 1975, Yagy took Hook to gambling halls and the two formed a gambling partnership which accumulated a \$900 debt by April of that year (421-426, 444). Yagy suggested that Hook drive a getaway car in a bank robbery which would yield the money to pay off their debt and get him some extra money (446). Several days later, Yagy introduced Hook to co-defendant James Lord, Jr. (who was using the name Jimmy O'Brien), and the three men went through the route of the robbery (447-449, 452-453). Lord said that the crime had been planned for the previous week but that it had been postponed because of a supermarket robbery in the area of the bank** (450-451).

*The court's oral opinion denying the motion to suppress Schwartz's confession is "E" to the separate joint appendix to appellants' briefs.

**Dennis Wakefield testified that in late March or early April 1976 Schwartz (whom Wakefield had known for ten years) visited his house with a man introduced to him as "Jimmy," who Wakefield "thought" was James Lord (313, 314, 315, 319, 323). Schwartz had a shotgun and told Wakefield that his and "Jimmy's" plan to hold up a bank had been upset by the supermarket robbery next door to the bank (316, 317, 319).

Following their prearranged plan, Yagy picked up Hook on the morning of April 9, 1976, and drove him to a restaurant where he saw James Lord again and met appellant Schwartz (457). Lord, Schwartz, and Hook left the restaurant together and drove around until 9:00 a.m., when they arrived at the bank plaza. On the way to the bank they switched cars and Schwartz put several shells into a sawed-off shotgun (463-466). Schwartz (armed with the shotgun) and Lord (armed with a pistol) went into the bank wearing coveralls, carrying pillowcases, and disguised by stockings pulled over their heads (466).

The individuals in the bank at the time of the robbery were ordered to lie down on the floor (282, 303, 307). None could give more than a general description of the two robbers, although several bank employees noted that the robbers were "moving fast" (300, 304). Hook, who was waiting in the car, estimated that Lord and Schwartz left the bank with bulging pillowcases approximately a minute after entering (466-467).

Hook drove to the parking lot, where the three men changed cars (466-467). In the downtown Rochester area they disposed of the clothes and pillowcases in trashcans and put the money and weapons into briefcases (469). The three went to a hotel room to sort out the money, and met several hours later at Schwartz's house, where Yagy and Hook were given their shares (469-472, 475).*

*Hook's share was \$9,700, from which Yagy took \$4,000 for his part in making the arrangements (475).

Lord claimed to have been visiting his mother in the hospital between 8:30 and 10:00 that morning (380). America DeCastro, a nurses's assistant at the hospital where Lord's mother was staying, had been in the patient's room at least three times between 8:30 and 10:30 a.m. and did not see any visitors (430-433).

FBI Agent Berry testified as to the circumstances of Schwartz's arrest and the taking of his confession on November 22, 1976. The confession of Schwartz's own involvement in the crime was read to the jury (667, 688-689). The defense attorneys again objected to the introduction of the confession (669-684).

2. The Stabbing of Hook

At the pretrial conference held on January 25, 1977, the attorneys made a motion in limine to preclude the Government from introducing proof of the alleged stabbing of Hook by Lord and Schwartz (A.48). Counsel explained that the assault was unrelated to the bank robbery, but the court denied the motion without prejudice (A.48-50, 55).

During jury selection on February 8, 1977, the prosecutor elicited that one of the prospective jurors had heard some publicity about the bank robbery but did not recall what he had heard (B.43). The Assistant United States Attorney then announced:

One of the Government's witnesses in this

case is a young man named Ronald Hook, and there was some publicity concerning Mr. Hook at one time as to the fact that he was stabbed some forty five times --

(B.44).

All three defense attorneys moved for a mistrial (B.44-45). In denying the motion, the court stated that if the prosecutor "does not prove in the case the conspiracy to the point where this work is admissible as evidence comes in as evidence, then he is going to suffer a mistrial" (B.48).

The attorneys renewed the motion when one juror admitted that the prosecutor's remark had refreshed his recollection that Hook had been "stabbed because he didn't get his share of the money" (B.49, 80). Another juror, who had cited his experience in the military as a defense counsel, prosecutor, and member of courts martial, stated that the stabbing would lend credence to Hook's testimony (B.51). Several of the prospective jurors said that even if they heard nothing further about the stabbing they could not forget about the incident (B.98-99, 133-134). The attorneys argued that the jurors would be influenced by the opinion of the juror with military legal experience and that there was no way of determining the extent to which the others were prejudiced by the prosecutor's remark. The court continued to deny the motions for a mistrial (B.52-53, 159-161).

At the Wade hearing, Hook testified that a policeman had interviewed him at the hospital shortly after the stabbing. In response to the officer's question as to whether the assault

had been precipitated by another crime, Hook answered, "Yes, I told him the Wegman [supermarket] robbery on the 5th of July" (279-280).

Despite Hook's own statement, the prosecutor argued to the court that the stabbing could only have been motivated by a desire to prevent Hook from testifying against the others in regard to the bank robbery (509-511). The Government stated that Hook would testify that Lord and Yagy met with Hook to tell him to leave town because of police pressure in the investigation of the bank robbery, and that this meeting led directly to the stabbing (511-512).

In laying a foundation to introduce proof of the stabbing at trial, the prosecutor asked Hook about his conversation with Lord and Yagy on July 12 or 13. Hook stated that they told him to leave town because of police pressure, but unambiguously answered that this had nothing to do with the bank robbery (521-522). At that point, the court announced that "[t]he rules have changed" (522), cut off the line of questioning, and reserved decision on the renewed mistrial motion on behalf of all three defendants (523).*

Though the court thereafter instructed Hook to make no mention of the stabbing, the witness (in unresponsive answers on cross-examination) made reference to "that unfortunate incident" (609). When asked whether he had made a deal with the

*The motion was subsequently denied (781).

Government, Hook answered, "When I gave the information to the authorities in the hospital, I had no guarantee whatsoever" (165; emphasis added). On both occasions, co-counsel moved for a mistrial (607, 615).

The defense attorneys brought to the court's attention various newspaper articles on February 10, 11, and 12, that dealt in some detail with the bank robbery as well as the stabbing of Hook. The articles mentioned that at the time of his arrest Schwartz was on the FBI's "Ten Most Wanted" list and that Hook was in the witness protection program (528-530, 798-800; Democrat & Chronicle, Saturday morning, February 12, 1977 (Appendix D)). The lawyers pointed out that the Democrat & Chronicle, which had run stories on the case for three days during the trial, was the only morning paper of general circulation in Monroe County and the entire Genessee Region (530-531). All three defendants requested that the court poll the jurors to determine whether they had read the articles and been influenced by them, and also to give a specific cautionary instruction (528-529, 536). The court refused, and merely reiterated its general admonition to the jurors not to read the newspapers or watch television (623).

3. The Defense

Dr. Fortunato Abello, a surgeon, and Dr. Charles Newton, a neurologist, had both treated appellant Schwartz for his back injuries (755-756, 763-764). This condition would have

made it difficult for Schwartz to have run in April 1976 (760, 770).

4. Verdict and Sentence

The jury found appellant Schwartz and co-defendant Lord guilty of all three counts, and co-defendant Yagy guilty of Counts I and III; the court had dismissed the armed bank robbery count with respect to Yagy.

On March 18, 1977, Schwartz was sentenced to 25 years' imprisonment on the bank robbery counts, to run consecutively to a five-year sentence for conspiracy.

ARGUMENT

Point I

THE REFERENCES THROUGHOUT THE TRIAL
TO THE STABBING OF THE UNINDICTED
CO-CONSPIRATOR AND THE PREJUDICIAL
PUBLICITY ABOUT THE CASE DEPRIVED
APPELLANT SCHWARTZ OF A FAIR TRIAL.

As the defense attorneys continuously asserted and the court ultimately found, the stabbing of Hook, the unindicted co-conspirator, was unrelated to the bank robbery. Nevertheless, the court permitted the prosecutor to mention this extraordinarily prejudicial fact to the jury and continued to deny the mistrial motions made by the defense when Hook alluded to this event at trial. The court further erred in failing to safeguard the defendants from the damaging publicity during trial. These errors require a new trial.

A.

From the first pretrial conference, the defense attorneys sought to prevent the Government from bringing the stabbing to the jurors' attention. The court was insensitive to the danger of unfair prejudice, and even permitted the prosecution to inform the prospective jurors at the voir dire that Hook had been stabbed 44 times. As the record reveals, this remark revived the recollections of the jurors, and one of them recalled that Hook had been stabbed by his accomplices to avoid giving him his share of the spoils of the crime (B.49). Moreover, the

prosecutor's statement firmly implanted the most inflammatory piece of information into the minds of the prospective jurors who had no prior knowledge of the case. Several members of the panel not only admitted that they could not forget about the stabbing, but one of them (who had had legal experience in the military) stated that his knowledge of the assault would lead him to give greater weight to Hook's testimony. In view of the remark of the Assistant United States Attorney and the subsequent statements of the prospective jurors in the presence of the entire panel, the court should have granted the mistrial motion.

The stabbing of Hook could only serve to confuse the issues and inflame the jurors. See Federal Rules of Evidence, Rule 403. This evidence certainly possesses greater potential for prejudice than unrelated death threat testimony, which is usually kept from the jury. United States v. Panebianco, 543 F.2d 447 (2d Cir. 1976). Moreover, the evidence was not even relevant (see Rule 402), since the assault was unrelated to the bank robbery. The Government's theory that there was a connection between the bank robbery and the stabbing was thoroughly repudiated by Hook at both the Wade hearing and at trial. Hook clearly stated that his stabbing was related to the supermarket robbery. Though the court had previously promised to declare a mistrial if the Government failed to link the stabbing to the bank robbery (B.46-47), it failed to do so. The court did not even grant this relief when Hook, in

unresponsive answers to defense questioning, alluded to his hospital stay and "that unfortunate incident."

Even if the prosecutor's theory of the events had been correct, he nevertheless erred in contending that the stabbing could be viewed as part of the conspiracy. According to the confession by Schwartz,* he and Lord had stabbed Hook in response to the latter's attempt to extort \$2,000 from them to keep quiet about the bank robbery. Since the bank robbery had occurred months earlier, the object of the conspiracy had ended. As the Supreme Court has held, once "the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment." Grunewald v. United States, 353 U.S. 391, 401-402 (1957). In United States v. Floyd, Docket No. 76-1462, slip op. 3495 (2d Cir., May 16, 1977), this Court has recently held that the arson of a getaway car on the day after a bank robbery was outside the bounds of the conspiracy. The stabbing of Hook was certainly much further removed from the conspiracy than was the burning of the car in Floyd. The stabbing occurred more than three months after the robbery. Moreover, while one may argue that it is

*This portion of the confession was not introduced at the trial.

standard operating procedure in a bank robbery for the culprits to steal a car and quickly dispose of it afterwards (Floyd, slip op. at 3505 (Lumbard, J., concurring and dissenting)), bank robbers could not reasonably expect that at some future time an accomplice would try to extort money from them. Thus, even if the prosecutor's version of the circumstances had been correct, the stabbing of Hook would still not have been relevant as part of the bank robbery conspiracy.

The references to the stabbing of the 17-year-old Hook by the middle-aged Schwartz and Lord could only have distracted the jurors from consideration of the relevant facts of the case. An error of this nature must be deemed prejudicial.

B.

In addition to the court's failure to prevent the prosecutor and Hook from injecting improper material into the proceedings, the court failed to protect the defendants from the prejudicial publicity during trial.

The defense attorneys brought to the court's attention newspaper articles which appeared on three consecutive days during the trial. These articles dealt in detail with the stabbing and Hook's membership in the witness protection program, as well as the fact that appellant Schwartz was on the FBI's "Ten Most Wanted" list at the time of his arrest. The lawyer pointed out that three of the articles appeared in the only morning paper of general circulation in the entire Genesee Region, and that it was therefore likely that the articles

had come to the attention of some of the jurors. The court, however, denied both the request to conduct a voir dire to determine whether the jurors had seen the articles or to give a specific cautionary instruction. The court's refusal to do either constituted error.

The Supreme Court has recognized the trial judge's "duty to protect [the defendant] ... from inherently prejudicial publicity...." Sheppard v. Maxwell, 384 U.S. 333, 363 (1966). A court's failure to question the jurors about prejudicial articles that have come to their attention has been held reversible error. United States ex rel. Greene v. New Jersey, 519 F.2d 1356 (3d Cir. 1975); United States v. Pomponio, 517 F.2d 460 (4th Cir. 1975); see Margoles v. United States, 407 F.2d 727, 735 (7th Cir.), cert. denied, 396 U.S. 833 (1969); Silverthorne v. United States, 400 F.2d 627, 643 (9th Cir. 1968). The trial judge should have examined the jurors individually on the subject. See United States v. Pfingst, 477 F.2d 177, 186 (2d Cir. 1973); United States v. Bentvena, 319 F.2d 916, 934 (2d Cir.), cert. denied, 375 U.S. 940 (1963); United States v. Agueci, 310 F.2d 817, 831-832 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963). At the very least, the court was required to give a specific instruction on the articles to overcome the prejudice. See United States v. Mejias, 552 F.2d 435, 446 (2d Cir. 1977); United States v. Baker, 442 F.2d 1024, 1025 (2d Cir. 1971); see also ABA Standards Relating to Fair Trial and Free Press, §3.5(e), (f) (1968).

In sum, the court not only permitted the Government to bring the inflammatory and irrelevant matter of the stabbing to the jurors' attention, but failed to safeguard the defendants from harmful publicity. Since there is a realistic likelihood that appellant Schwartz was convicted because of the stabbing and his presence on the FBI's "Ten Most Wanted" list rather than because of the admissible evidence against him, a new trial must be ordered.

Point II

THE COURT ERRED IN FAILING TO SUPPRESS APPELLANT SCHWARTZ'S POST-INDICTMENT CONFESSION, WHICH WAS TAKEN IN VIOLATION OF HIS RIGHT TO COUNSEL AND TO A PROMPT ARRAIGNMENT.

Appellant Schwartz was arrested upon an indictment and arrest warrant by a group of armed FBI agents who burst into his Bronx apartment at 8:35 a.m. He was not taken to the United States Courthouse or to the FBI headquarters in Manhattan, but was taken in the opposite direction to the FBI office in New Rochelle. The agents strip-searched him and questioned him until he confessed to the instant crime as well as to various state offenses. After signing the confession, appellant Schwartz was brought to the FBI office in Manhattan, and then to the United States Attorney's office for further questioning. Schwartz was not taken to arraignment until 4:37 that afternoon, more than eight hours after the arrest. The taking of the confession violated Schwartz's right to counsel under the Sixth Amendment as well as his right to a prompt arraignment (Rule 9(c)(1), Fed.R.Crim.P.; 18 U.S.C. §3500).

A.

Since Schwartz had been indicted at the time of his arrest, adversary judicial proceedings had been initiated against him and his Sixth Amendment right to counsel had attached.

United States v. Satterfield, Doc. No. 76-1372, slip op. 805, 807 (2d Cir., December 7, 1976); see Kirby v. Illinois, 406 U.S. 682, 688 (1972); Massiah v. United States, 377 U.S. 201 (1964). As in Massiah, id. at 206, appellant Schwartz "was denied the basic protections of that guarantee [Sixth Amendment right to counsel] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel." See United States v. Garcia, 377 F.2d 321, 324 (2d Cir. 1967). The doctrine of Massiah applies both where incriminating statements are elicited surreptitiously (as occurred in that case) and where they are elicited by direct interrogation (as in the instant case). Brewer v. Williams, ___ U.S. ___, 45 U.S.L.W. 4287, 4291 (March 23, 1977); United States v. Garcia, supra, 377 F.2d at 324.

While the giving of the Miranda warnings may have satisfied the requirements of the Fifth Amendment, it did not satisfy "the higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment has attached." United States v. Satterfield, supra, slip op. at 808, citing United States v. Massimo, 432 F.2d 324, 327 (2d Cir. 1970) (Friendly, J., dissenting), cert. denied, 400 U.S. 1022 (1971). To establish waiver, the Government must prove "not merely comprehension [of the right to counsel] but relinquishment ..." and "courts indulge in every reasonable presumption against waiver." Brewer v. Williams, supra, 45 U.S.L.W. at 4292.

Clearly the agents did not attempt to make Schwartz "aware of the dangers and disadvantages of self-representation that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' Adams v. United States ex rel. McCann, 317 U.S. at 279." Faretta v. California, 422 U.S. 806, 835 (1974); see United States v. Satterfield, supra, slip op. at 807. That Schwartz was not competent to deal with the authorities without legal advice (see Michigan v. Mosely, 423 U.S. 96, 110 n.2 (1974) (White, J., concurring); Brewer v. Williams, supra, 45 U.S.L.W. at 4292 n.10) is revealed by his request prior to signing the waiver of rights form for the agents' advice as to whether he would be returned to Rochester to face the charges (48, 82-83).^{*} Further mitigating against an intelligent waiver is the fact that though the agents informed Schwartz of the nature of the charges, the record is barren of any proof that they told him of the outstanding indictment. As Judge Frankel held in United States ex rel. Lopez v. Zelker, 344 F.Supp. 1050, 1055 (S.D.N.Y. 1972), affirmed, 465 F.2d 1405, cert. denied, 409 U.S. 1049 (1972), the existence of an indictment was "a matter of obvious moment" and Lopez's ignorance "of so stark a legal fact" precluded him from achieving an "intelligent" waiver. This was so despite Lopez's apparent knowledge that he was wanted for killing the

^{*}Schwartz's confusion at that point is understandable as he has just been the subject of a raid by FBI agents and had been subjected to "the unnecessary indignity" (United States v. Duvall, 537 F.2d 15, 23 (2d Cir. 1976)) of a strip search.

victim. Id., 344 F.Supp. at 1055. The interrogation of Schwartz after indictment in the absence of counsel and without "the clearest and most explicit explanation of what was being given up" (Lopez, supra, 344 F.Supp. at 1054) and, in fact, without informing him of the outstanding indictment, violated his rights under the Sixth Amendment. Counsel's motion to suppress the confession on this ground (110) should have been granted.

B.

As appellant Schwartz was arrested under an indictment, the arresting officer was required under Rule 9(c)(1) to bring him "promptly before the court or before a United States Magistrate." Compare Rule 5 (for arrest under a warrant -- "unnecessary delay"). The eight-hour delay in the instant case was not for the purpose of "routine processing" (United States v. Collins, 462 F.2d 792, 795 (2d Cir. 1972)), but for the purpose of obtaining a confession. Schwartz could as easily have been processed in the FBI's Manhattan office, where he was ultimately taken, as in the New Rochelle office, and travel time would have been diminished had the agents proceeded south to Manhattan rather than north to New Rochelle. Unlike the situation in United States v. Curry, 358 F.2d 904, 912 (2d Cir. 1966), the agents were not seeking to ascertain whether Schwartz had taken part in the robbery or where his accomplices were -- all three defendants had been indicted and the others had already been arrested. Moreover, there can be no justification for the

questioning by an Assistant United States Attorney following the already long period of interrogation by the FBI agents. See United States v. Duvall, supra, 537 F.2d at 23-24 n.9. Therefore, the delayed arraignment violated Schwartz's right to be brought "promptly" before a judge.

As the confession was taken in violation of Schwartz's right to counsel as guaranteed by the Sixth Amendment and his right to a prompt arraignment under Rule 9, the court erred in denying the motion to suppress.

Point III

IN VIEW OF THE DESTRUCTION OF AGENT MARTINEAU'S ROUGH NOTES OF THE INTERVIEW WITH APPELLANT SCHWARTZ, THE COURT ERRED IN REFUSING TO STRIKE THE TESTIMONY REGARDING THE CONFES- SION.

FBI Agent Martineau took notes of the interview with appellant Schwartz following his arrest. These notes were missing at the time of the hearing on Schwartz's motion to suppress the confession. Since Martineau did not testify at either the hearing or the trial, and since Schwartz claimed that a crucial part of the agents' conversation with him was missing from the typed report, the unavailability of the notes should have resulted in the striking of the testimony concern- ing Schwartz's confession.

This Court has several times held that an agent's good faith destruction of his rough notes does not require strik- ing his testimony. United States v. Mase, Docket No. 77-1009, slip op. 4037, 4045 (2d Cir., June 6, 1977); United States v. Anzalone, Docket No. 76-1458, slip op. 3391, 3399 (2d Cir., May 6, 1977); United States v. Terrell, 474 F.2d 872, 877 (2d Cir. 1973); but see United States v. Harrison, 524 F.2d 435 (D.C. Cir. 1975). In the instant case, however, the agent who took the handwritten notes and presumably compared them to the typed statement was never called by the Government, and there- fore could not be examined about the events that occurred. The

notes were especially crucial to the defense, for Agents Berry and Hutton stated that Martineau had converted his notes of the questions and answers into a narrative statement for Schwartz to sign. Obviously, Martineau had to make changes and deletions in the process.

Unlike the situation in United States v. Harris, 543 F.2d 1247, 1253 (9th Cir. 1976), the court's refusal to strike the agents' testimony cannot be deemed harmless error. Schwartz claimed that during the interview the agents misinformed him about Rule 20 and told him he had to confess in order to be tried in the Southern District of New York. Thus, he did not contest the substance of the confession which he had signed, but other portions of the conversation which may have been taken down by Martineau in his rough notes but would have been omitted from the typed statement.

Since the confession was the most devastating evidence against appellant Schwartz, the error mandates a reversal and the ordering of a new trial.

Point IV

INSOFAR AS THEY ARE NOT INCONSISTENT
WITH ARGUMENTS RAISED ON APPELLANT
SCHWARTZ'S BEHALF, HE ADOPTS THE
ARGUMENTS RAISED IN THE BRIEFS OF
CO-APPELLANTS LORD AND YAGY.

CONCLUSION

For the foregoing reasons, the judgment of the district
court should be reversed, the confession suppressed, and a new
trial ordered.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
GERHARDT J. SCHWARTZ
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

BARRY BASSIS,
Of Counsel.

CERTIFICATE OF SERVICE

July 5, 1977
corrected

I hereby certify that a ~~copy~~ copy of this brief and appendix has been mailed to the United States Attorney for the ~~Western~~ District of New York.

Barry Bass